

GARA-Mending the Doctrine of Foreign Affairs Preemption

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NOTE

GARAMENDING THE DOCTRINE OF FOREIGN AFFAIRS PREEMPTION

Joseph B. Crace, Jr.†

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INTRODUCTION

Since the founding of the republic, few powers have been as exclusively reserved to the federal government as the power to conduct foreign affairs. Despite persistent attempts by states to infringe upon this prerogative, courts have repeatedly held that state law must yield if it impairs either Congress's or the executive branch's conduct of foreign policy.

Foreign affairs preemption has become especially important in recent years as globalization has expanded the scope of what constitutes "foreign affairs."¹ In the recent decision *American Insurance Association v. Garamendi*, the Supreme Court held that a California insurance statute mandating disclosure of outstanding Holocaust-era insurance claims was preempted by an executive agreement.² The Court reasoned that the state statute conflicted with an executive order designed to harmonize the resolution of such claims through international cooperation.³ Although the conflict between California's statute and the executive order in *Garamendi* may have been evident, the subsequent future application of the Court's rationale may limit state power to legislate with respect to an ever-increasing number of

¹ *A Survey of Globalisation and Tax*, ECONOMIST, Jan. 29, 2000, at 5 (defining globalization as "a diminishing role for national borders and the gradual fusing of separate national markets into a single global marketplace"); see Sandra L. Lynch, *The United States, the States, and Foreign Relations*, 33 SUFFOLK U. L. REV. 217, 219 (2000). Thus, with the diminution of national borders and increased economic interdependence, issues that states previously might have legislated and considered to be within the domestic sphere are now becoming matters of international importance to be handled exclusively by the federal government. *A Survey of Globalisation and Tax*, *supra*.

² 539 U.S. 396, 420–25 (2003).

³ *Id.* at 413–29.

topics. The Court's reasoning suggests that even vaguely defined federal action may be sufficient to preempt state legislation.⁴

This Note seeks to accomplish two goals. First, it attempts to discern a current, clear standard for foreign affairs preemption in light of *Garamendi*. Second, this Note analyzes the possible policy implications of the Court's preemption doctrine and seeks to determine the extent to which current federal preemption doctrine affects the ability of states to legislate in areas of traditional state power. Part I outlines the legal history of foreign affairs preemption and delineates the state of preemption doctrine prior to *Garamendi*. Part II explores the reasoning of the *Garamendi* Court and the way in which this case reflects current conceptions of foreign affairs preemption. Part III argues that the *Garamendi* Court enunciated a preemption standard that is more statutory than dormant, though the Court appeared hesitant to retire the dormant concept altogether. Finally, Part IV argues that *Garamendi* represents a positive development in the law of foreign relations because expansive foreign affairs preemption serves the U.S. national interest, and alternative means of limiting potentially boundless judicial discretion exist.

I

THE PREEMPTION DOCTRINE

A. Constitutional Foundations

Although courts and commentators dispute the scope of foreign affairs preemption, it is difficult to deny (at least on a broad level) that the conduct of the nation's foreign policy is a federal prerogative.⁵ Even a cursory reading of the Constitution reveals that the Framers intended to assign primary responsibility for the conduct of foreign affairs to the federal government.⁶ Specifically, Article I, § 8 enumerates the express congressional foreign affairs powers,⁷ while Article II,

⁴ See *id.* at 425.

⁵ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 cmt. 5 (1987) [hereinafter RESTATEMENT] ("A State of the United States is not a 'state' under international law . . . , since by its constitutional status it does not have capacity to conduct foreign relations."); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 25 (2d ed. 1996) ("In foreign affairs . . . the federal government has undisputed monopoly, and it has plenary powers rooted in its 'sovereignty' beyond those expressed in the Constitution.")

⁶ See, e.g., THE FEDERALIST NO. 41, at 264 (James Madison) (Arlington House 1966) ("The . . . class of powers lodged in the general government consist of those which regulate the intercourse with foreign nations If we are to be one nation in any respect, it clearly ought to be in respect to other nations.")

⁷ U.S. CONST. art. I, § 8. The Constitution grants to Congress the power to regulate commerce with foreign Nations (the "foreign commerce clause"), to establish uniform rules of naturalization, to regulate the value of "foreign coin," "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Na-

§ 2 details the executive's authority to act on the global stage.⁸ Further supporting the federal government's exclusive authority over foreign affairs, Article I, § 10 specifically restricts the ability of the states, among other things, to enter into treaties or agreements with foreign powers.⁹ There is little dispute regarding the exclusive federal authority to act within the scope of these enumerated (and "assumed-by-sovereignty") powers.¹⁰ Furthermore, independent of these enumerated powers, the Supremacy Clause grants the federal government the right to trump any state law inconsistent with a federal enactment.¹¹

More controversial, however, is the constitutional support for the theory of "dormant foreign affairs preemption," a theory that permits courts to invalidate state actions infringing upon the foreign affairs sphere in the absence of any on-point, conflicting federal action.

B. Theoretical Overview

The idea of state exclusion from the conduct of foreign affairs is therefore not novel. The Constitution expressly places specific aspects of foreign affairs within the federal realm.¹² For example, waging war and negotiating treaties are strictly federal prerogatives.¹³ Even outside these enumerated provisions, most foreign affairs questions fall within the scope of the Supremacy Clause because treaties

tions; [t]o declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." *Id.*

⁸ U.S. CONST. art. II, § 2. The Constitution grants to the executive branch—the President—the title of Commander in Chief of the armed forces, as well as the power, with the advice and consent of the Senate, to enter into treaties and to appoint ambassadors. *See id.*

⁹ U.S. CONST. art. I, § 10. The Constitution prohibits the states from entering into a treaty, alliance, or confederation, as well as from taxing imports and exports, keeping troops or ships of war in time of peace, entering into an agreement with another state or foreign power, or engaging in war not based in self-defense without Congressional consent. *See id.*

¹⁰ *See* RESTATEMENT, *supra* note 5, § 1 cmt. 1 ("Congress . . . has an unexpressed power to legislate in foreign affairs, a legislative component of powers of the United States that inhere in its sovereignty and nationhood."); HENKIN, *supra* note 5, at 25 (noting the federal government's "undisputed monopoly" in the area of foreign relations).

¹¹ *See* U.S. CONST. art. VI, cl. 2 (

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 189 [hereinafter Goldsmith, *Statutory Preemption*].

¹² *See* U.S. CONST. art. I, § 8; *id.* art. II, § 2; *see also* Goldsmith, *Statutory Preemption*, *supra* note 11, at 194 ("Preemption would follow as a constitutional matter and there would be no need for statutory interpretation."); *supra* Part I.A (detailing explicit constitutional enumerations).

¹³ *See* U.S. CONST. art. I, § 8; *id.* art. II, § 2.

and federal law automatically supersede any inconsistent state law.¹⁴ Nevertheless, cases arise in which the federal government wishes to invalidate a state action despite the lack of facially contradictory federal policy. In such cases, the question of preemption becomes controversial.

A state law can be preempted even if it is not necessarily inconsistent with federal law as long as the federal government has “occupied the field” by legislating on the subject matter and exhibiting a desire to exclude the states.¹⁵ Within the broad category of preemption, there are two specific types: statutory and dormant.¹⁶ The first refers to cases in which relevant federal law clearly “occupies the field” of legislation relating to the subject matter—the statutes sometimes even including a preemption clause.¹⁷ Under this theory of preemption, if the federal government has “occupied the field” by legislating on the subject matter and evoking a desire to exclude the states, then preemption automatically invalidates state laws in the area—even if they are consistent with the federal measures.¹⁸ Dormant preemption, on the other hand, is broader in scope and addresses those cases in which there is no official federal policy on point but where the state legislation may nonetheless infringe upon federal power.¹⁹ Thus, the concept of dormant preemption comes perilously close to placing an

¹⁴ HENKIN, *supra* note 5, at 156. This same idea applies to executive agreements and court-made law, as they also enjoy constitutional supremacy. *Id.* at 157; *see also* United States v. Pink, 315 U.S. 203, 233 (1942) (“We repeat that there are limitations on the sovereignty of the States. No State can rewrite all foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively.”); RESTATEMENT, *supra* note 5, § 1 cmt. 5 (“[P]rinciple would support the view that the federal government can preempt and exclude the States not only by statute but by treaty or other international agreement, and even by executive acts that are within the President’s constitutional authority.”).

¹⁵ HENKIN, *supra* note 5, at 157–58. Although at the time Henkin wrote *Foreign Affairs and the United States Constitution* the Supreme Court had only found preemption in acts of Congress, Henkin notes that there is no reason that an executive agreement or judicial doctrine might not also be construed as an occupying force which “closes the field” to state regulation that is not inconsistent. *Id.* at 158; *see also* RESTATEMENT, *supra* note 5, § 1 cmt. 5 (“Supremacy implies that State law and policy must ban not only when inconsistent with federal law or policy but even when federal authority has shown a purpose, by ‘preempting’ or ‘occupying the field,’ to exclude every State activity that is not inconsistent with federal law or policy.”).

¹⁶ *See* Goldsmith, *Statutory Preemption*, *supra* note 11, at 203–08.

¹⁷ *See id.* at 205–08.

¹⁸ *See supra* note 14.

¹⁹ Goldsmith, *Statutory Preemption*, *supra* note 11, at 203. Implicit in this idea of dormant foreign affairs preemption is the belief that rather than intending to limit plenary federal power to those foreign affairs concerns specifically enumerated in the Constitution, the Framers intended the entire field of foreign affairs to be a federal prerogative. *See id.* at 203–05.

implicit constitutional limitation on the state's power to legislate.²⁰ As such, dormant preemption draws fire from those "revisionist" commentators who believe foreign affairs preemption should be narrowly interpreted to preempt state actions only when the federal government has taken express action and enunciated a clear national policy.²¹

C. Statutory Preemption

Although the concept of statutory preemption is expansive, it remains somewhat less abstract than its dormant counterpart. Professor Jack Goldsmith, in his article *Statutory Foreign Affairs Preemption*, details several variants of statutory preemption.²² Goldsmith's variants include the theories of express preemption, conflict preemption, obstacle preemption, and field preemption.²³ Despite the considerable differences among these four categories, each of these concepts remains distinct from dormant preemption because they are rooted in existing federal law.²⁴

Express preemption occurs when a federal statute expressly addresses the preemption question on its face, such as through the use of a preemption clause.²⁵ Goldsmith's three other variants are more ambiguous; they derive their theoretical basis from existing federal law that does not expressly convey preemptive intent.²⁶ For example, conflict preemption occurs when a state statute "conflicts" with a fed-

²⁰ Cf. HENKIN, *supra* note 5, at 163–64 (noting that *Zschernig v. Miller*, 389 U.S. 429 (1968), "imposed additional limitations on the states, but what they are and how far they reach still remain to be determined").

²¹ See Michael D. Ramsey, *Review Essay: Textbook Revisionism*, 43 VA. J. INT'L L. 1111, 1116–19 (2003) (reviewing CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* (2002)) (discussing and defining foreign affairs revisionism). Revisionists tend to reject what they label as foreign affairs "exceptionalism," in which, for preemption purposes, state statutes touching on foreign affairs are treated with less deference than statutes concerning only domestic issues. *Id.* at 1116. Revisionists also reject the idea of dormant foreign affairs preemption, citing a lack of constitutional support for the idea. See *id.* at 1118–19. For an in-depth discussion of this debate, see *infra* Part III.B.1.

²² See Goldsmith, *Statutory Preemption*, *supra* note 11, at 202–08. Goldsmith has done the same with different theories of dormant preemption. This Note begins with Goldsmith's categories and incorporates seminal cases within the case law of foreign affairs preemption. From this starting point, this Note seeks to determine whether these different theories of preemption are mutually exclusive, or whether courts have used a combination of these theories in deciding questions of preemption.

²³ *Id.* at 205–06.

²⁴ See *id.* at 205–08.

²⁵ *Id.* at 205.

²⁶ See *id.* at 205–06 (discussing how these final three types of statutory preemption are actually forms of "implied" preemption, relying "on evidence of congressional intent to preempt that [which] is not apparent on the face of the statute"). Some courts and commentators take issue with the more expansive concepts of implied statutory preemption. The further one gets from an express indication of preemptive intent—and the more tentative the connection between the subject matter of the state statute and its preempting

eral statute, thus making it impossible to comply with federal law.²⁷ Obstacle preemption identifies the “purposes and objectives” of a federal statute that is “silent about preemptive scope,” with preemption following only if the state statute “‘stands as an obstacle to the accomplishment’ of these purposes and objectives.”²⁸ Finally, field preemption is significant because it serves as a boundary between the concepts of statutory and dormant preemption. A state law may be preempted on field preemption grounds when the federal government has either acted so definitively within a field “so as to le[ave] no room for the states to supplement it”²⁹ with their regulations, or when the federal interest in controlling a certain subject is so strong as to presume that federal law precludes any state action on the same matter.³⁰

While the majority of foreign affairs preemption cases are decided on statutory grounds,³¹ it is often difficult to identify the specific type of statutory preemption because Goldsmith’s four variants tend to blur. Consider, for example, *Crosby v. National Foreign Trade Council*, which exemplifies both obstacle preemption and field preemption.³² In *Crosby*, the act in question was a Massachusetts law passed to discourage local businesses from doing business with Myanmar (formerly Burma) in order to draw attention to the human rights abuses in that country.³³ The Supreme Court held that the state law was preempted because it “undermined the intended purpose and ‘natural effect’ of at least three provisions” of a recent federal act addressing the issue.³⁴ Furthermore, the Court’s opinion suggests that even if the Court had not found that the state law undermined the federal measure, it would have held that Congress had already occupied the field and therefore preempted state action on a “field preemption” theory.³⁵

federal counterpart—the smaller the distinction between statutory and dormant preemption. *See id.* at 206–07.

²⁷ *Id.* at 205.

²⁸ *Id.* at 205–06 (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

²⁹ *Id.* at 206 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

³⁰ *Id.* at 206 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

³¹ *See, e.g.*, *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 370–73 (2000) (holding the Massachusetts Burma Law preempted on statutory grounds); *Taiheiyo Cement Corp. v. Supreme Court*, 12 Cal. Rptr. 3d 32, 42–46 (Ct. App. 2004) (preempting a state statute under the theory of conflict (statutory) preemption); *Mitsubishi Materials Corp. v. Supreme Court*, 6 Cal. Rptr. 3d 159, 175–78 (Ct. App. 2003) (same).

³² 530 U.S. 363 (2000).

³³ *See* Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), 1996 Mass. Acts ch. 130, § 1 (codified at MASS. GEN. LAWS ch. 7, §§ 22G–22M, 40F(a) (1998)).

³⁴ *Crosby*, 530 U.S. at 373 (discussing the Massachusetts law as an “obstacle” to the exercise of federal policy).

³⁵ *Id.* at 372 (“When Congress intends federal law to ‘occupy the field,’ state law in that area is preempted.”).

D. Dormant Preemption

The concept of dormant preemption refers to judicial authority to invalidate state actions even when the federal political branches have taken no express action on the same subject.³⁶ The Supreme Court has neither endorsed nor rejected this concept, so the debate generally comes down to a doctrinal dispute.³⁷ Those who support dormant preemption (the “Conventional” camp, who are in the majority³⁸) believe that this form of preemption protects the plenary foreign relations power from state encroachment.³⁹ Opponents of dormant preemption (the “Revisionists,” currently in the minority⁴⁰), however, decry the concept as a means of implementing illegitimate judge-made law.⁴¹ Goldsmith identifies several distinct types of dormant preemption, such as dormant foreign affairs preemption, preemption under the federal common law of foreign relations, and dormant foreign commerce clause preemption.⁴²

Courts preempting on the basis of dormant foreign affairs preemption tend to justify their decisions by arguing that the Constitution reveals an overriding intent to entrust all matters of foreign affairs to the federal government.⁴³ Consequently, whether the federal government has legislated on the issue is irrelevant because the states have no right to pass laws on the subject in the first place.⁴⁴ Similarly, courts create the federal common law of foreign relations by extending the dormant foreign affairs power beyond preemption and

³⁶ Goldsmith, *Statutory Preemption*, *supra* note 11, at 203.

³⁷ See *infra* Part III.

³⁸ James J. Pascoe, Note, *Time for a New Approach? Federalism and Foreign Affairs After Crosby v. National Foreign Trade Council*, 35 VAND. J. TRANSNAT'L L. 291, 293 (2002).

³⁹ See HENKIN, *supra* note 5, at 162–63; Brannon P. Denning & Jack H. McCall, *States' Rights and Foreign Policy: Some Things Should Be Left to Washington*, 79 FOREIGN AFF. 9, 9–14 (2000); Lynch, *supra* note 1, at 221–23 (2000); cf. Emily Chiang, *Think Locally, Act Globally? Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 SYRACUSE L. REV. 923, 935 (2003) (discussing how traditional structural interpretations of the Constitution for domestic matters “may not hold in the context of foreign affairs”).

⁴⁰ See Pascoe, *supra* note 38, at 293.

⁴¹ See Goldsmith, *Statutory Preemption*, *supra* note 11, at 203 (“In operation . . . courts apply this structural constitutional doctrine on the basis of a judicial determination that the state law or activity has sufficiently bad effects for U.S. foreign relations.”). Goldsmith represents the typical revisionist view of foreign affairs law in general, not just with regard to dormant preemption. Revisionists oppose the idea of any sort of foreign affairs “exceptionalism,” and believe that the same preemption concepts should apply to foreign affairs as applies to any other type of law. See Ramsey, *supra* note 21, at 1119, 1122–23.

⁴² Goldsmith, *Statutory Preemption*, *supra* note 11, at 202.

⁴³ See, e.g., *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49–57 (1st Cir. 1999) (holding that the Massachusetts Burma Law infringed on powers “vested exclusively in the federal government”), *aff'd on other grounds sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

⁴⁴ *Id.*

using this power to author a federal rule of decision.⁴⁵ Finally, dormant foreign commerce clause preemption corresponds to domestic Commerce Clause analysis, asking whether “a state law facially discriminates against foreign commerce or has substantial discriminating effects,” or prevents the federal government from speaking with “one voice” in foreign commerce.⁴⁶ It is often difficult to distinguish between simple dormant foreign affairs preemption and dormant foreign commerce clause preemption, given that the only difference is whether the state law in question is commercial in nature.

Since the vast majority of preemption decisions are decided on the basis of statutory preemption, there is a marked lack of available case law illustrating dormant preemption.⁴⁷ Ironically, commentators derive some of the best arguments in favor of dormant preemption from the dicta in statutory preemption cases.⁴⁸ Nevertheless, one Supreme Court decision from the 1960s keeps the idea of dormant foreign affairs preemption alive.⁴⁹

Zschernig v. Miller is the quintessential dormant foreign affairs preemption case. At the height of the Cold War, the state of Oregon passed a law providing for escheat in cases in which a nonresident alien is set to inherit property.⁵⁰ The sole purpose of the statute was to make it difficult, if not impossible, for residents of Communist-bloc countries to inherit land from residents of Oregon.⁵¹ In support of the provision, Oregon claimed that it was within the states’ competency to regulate the descent and distribution of estates.⁵² Moreover, Oregon argued that just a few years earlier the Court in *Clark v. Allen*

⁴⁵ See Goldsmith, *Statutory Preemption*, *supra* note 11, at 204; see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416–37 (1964) (fleshing out the federal common law “act of state doctrine” that prescribes when a litigant in a U.S. court may challenge the validity of an act of a foreign sovereign government); Beth Stephens, *The Law of Our Land, Customary International Law as Federal Law After Erie*, 66 *FORDHAM L. REV.* 393, 441 (1997) (stating that *Sabbatino* stands for the principle that “disputes involving foreign affairs and international law are governed by federal common law in the absence of controlling legislative or executive branch actions” and this serves to “limit the players involved in the foreign policy arena”). Goldsmith categorizes the federal common law of foreign affairs as a branch of dormant preemption. Goldsmith, *Statutory Preemption*, *supra* note 11, at 203. This characterization is somewhat puzzling. When a court preempts a statute in the absence of existing federal action on the same subject, and in the absence of an express grant of constitutional power to do so, it would seem that what Goldsmith describes as plain “foreign affairs preemption” would fall *within* the category of “federal common law” because dormant foreign affairs preemption is actually judge-made doctrine. See *id.*

⁴⁶ Goldsmith, *Statutory Preemption*, *supra* note 11, at 204–05.

⁴⁷ See *supra* note 31.

⁴⁸ See *infra* Part IV.B.

⁴⁹ *Zschernig v. Miller*, 389 U.S. 429 (1968).

⁵⁰ *Id.* at 430–31. Escheat could be avoided if three requirements were satisfied: (1) a reciprocal U.S. right to take property on the same terms; (2) a right to receive payment from the foreign estate; (3) a reciprocal foreign right to receive estate proceeds. See *id.*

⁵¹ See *id.* at 437–41.

⁵² See *id.* at 440–41.

upheld a California reciprocity statute which required a "just matching of laws" between California and the nation in which the alien set to inherit resided.⁵³

Nevertheless, Justice Douglas, writing for the majority, distinguished *Clark* and held that the Oregon law was preempted on the ground that it "has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."⁵⁴ In particular, the Oregon law troubled the Court because it allowed state courts to sit in judgment of foreign governments.⁵⁵ Thus, the phrase "direct impact upon foreign relations" seemed to set the standard for preemption; in *Clark v. Allen* the Court had already ruled that an enactment having only "some incidental or indirect effect in foreign countries" would not be subject to preemption.⁵⁶

At first glance it appears that the significance of the *Zschernig* decision is that the Court preempted the statute despite a lack of federal legislation on the subject. *Zschernig's* real import, however, lies in its possible implications for state power. The Court held that "[t]he several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy."⁵⁷ Considering that, in a globalized society, more traditional "state" areas of regulation often touch on foreign affairs, will they too become targets for dormant foreign affairs preemption?

Critics of dormant foreign affairs preemption argue that *Zschernig* is bad law, or at least should be confined to its facts.⁵⁸ Nevertheless, others contend that the Supreme Court's dicta in cases such as *Crosby v. National Foreign Trade Council* and *Hines v. Davidowitz*⁵⁹ support dormant foreign affairs preemption.⁶⁰ Although the Supreme Court decided *Hines* on the ground that a Pennsylvania immigration statute stood "as an obstacle to the accomplishment and execution of the full

⁵³ *Id.* at 432-33 & n.5 (discussing *Clark v. Allen*, 331 U.S. 503 (1947)).

⁵⁴ *See id.* at 441.

⁵⁵ *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (expressing the same hesitation to endorse judicial review of the acts of a foreign sovereign). Although here the act of state doctrine and the concept of dormant preemption seem to converge, the exploration of potential similarities and differences surrounding the concepts is a task beyond the scope of this Note. In any event, both can be criticized on the same grounds: they are judicial innovations with no basis in statutory or constitutional law.

⁵⁶ *Clark*, 331 U.S. 503, 517 (1947).

⁵⁷ *Zschernig v. Miller*, 389 U.S. 429, 440 (1968).

⁵⁸ *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 439-40 (2003) (Ginsburg, J., dissenting).

⁵⁹ 312 U.S. 52 (1941).

⁶⁰ *See, e.g., Carlos Manuel Vázquez, W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1262 (2001) (arguing that "*Crosby* . . . offers little cause for celebration to the critics of [the] dormant foreign affairs doctrine").

purposes and objectives of Congress,"⁶¹ the Court declined to resolve the question of whether "federal power in this field, whether exercised or unexercised, is exclusive."⁶² Professor Goldsmith points out—and is technically correct in his assertion—that the *Hines* Court did not reserve the foreign affairs domain to the federal government, which would have invalidated *any* state action adversely affecting foreign relations.⁶³ At the same time, however, the Court did not expressly deny this exclusivity,⁶⁴ opting instead to reserve judgment on the question.⁶⁵

Crosby presents a similar conundrum. The Supreme Court decided *Crosby* on strict statutory preemption grounds. Nevertheless, both the District Court and the Court of Appeals for the First Circuit had first overruled the Massachusetts statute⁶⁶ citing *Zschernig*, claiming that any state measure must give way if it "impair[s] the effective exercise of the Nation's foreign policy."⁶⁷ In its subsequent opinion affirming the Court of Appeals on other grounds, the Supreme Court passed upon an opportunity to address these assertions.⁶⁸ The Court once again failed to overturn or disavow the *Zschernig* analysis.

The importance of the *Garamendi* decision—a preemption case hovering somewhere between statutory and dormant preemption—is thus clear. The decision itself is best categorized as an application of statutory preemption because the Court preempted the California statute on the grounds that the law obstructed the realization of the goals of an executive agreement. Nevertheless, the attenuated connection between the agreement and the California law suggests that the Court may have been invoking dormant preemption under the guise of its statutory counterpart, or alternatively, the Court may have been simply leaving the door open for a possible future application of the dormant theory.

61 *Hines*, 312 U.S. at 67.

62 *Id.* at 62; see Goldsmith, *Statutory Preemption*, *supra* note 11, at 187–88 (arguing that *Hines* articulated the distinction between field and obstacle preemption and did not argue that federal power in foreign relations is exclusive of the states).

63 Goldsmith, *Statutory Preemption*, *supra* note 11, at 187–88.

64 *Hines*, 312 U.S. at 62.

65 *Id.*

66 See *supra* notes 32–35 and accompanying text.

67 *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 52 (1st Cir. 1999), *aff'd on other grounds sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); see also *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998) (holding that the Burmese law impinged on the federal foreign affairs power).

68 *Crosby*, 530 U.S. at 370–73.

II

THE GARAMENDI DECISION

A. Facts

The *Garamendi* case arose out of several insurance entities' challenge to California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA) on the grounds that national foreign policy interests and previous federal agreements preempted the state law.⁶⁹

1. *The Holocaust Victim Insurance Relief Act*

HVIRA was a core component of California's ongoing initiative to force insurance companies that issued policies to Holocaust victims before World War II to pay on those policies.⁷⁰ The disputed provisions imposed extensive disclosure requirements on insurance companies operating in California. Specifically, the statute mandated that any insurer doing business in California disclose details of life, property, liability, health, annuities, dowry, educational, or casualty insurance policies issued to persons in Europe, which were in effect between 1920 and 1945.⁷¹ The sweeping disclosure requirement covered policies sold by any "related company," including "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer,"⁷² regardless of whether the companies were related at the time the policies were sold.⁷³ HVIRA required that companies disclose information on policies sold to anyone during that time,⁷⁴ including such information as current policy sta-

⁶⁹ CAL. INS. CODE §§ 13800-07 (West Cum. Supp. 2004).

⁷⁰ See *id.* at 409 (referring to CAL. INS. CODE §§ 790.15(a), 12967(a)(1), (2) (West Cum. Supp. 2004), which make it an unfair business practice for an insurance company to fail to pay a Holocaust claim and place an "affirmative duty" on the Department of Insurance to help Holocaust survivors with their claims). The next year, the legislature opened the California state courts to private litigation on the nonpayment of Holocaust claims and extended the statute of limitations. CAL. CIV. PROC. CODE § 354.5 (West Cum. Supp. 2004).

⁷¹ CAL. INS. CODE § 13804(a) (West Cum. Supp. 2004). The statute provides:

(a) Any insurer currently doing business in the state that sold life, property, liability, health, annuities, dowry, educational, or casualty insurance policies, directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945, whether the sale occurred before or after the insurer and the related company became related, shall, within 180 days following enactment of this act, file or cause to be filed the following information with the commissioner to be entered into the registry:

- (1) The number of those insurance policies.
- (2) The holder, beneficiary, and current status of those policies.
- (3) The city of origin, domicile, or address for each policyholder listed in the policies.

Id.

⁷² *Id.* § 13802(b).

⁷³ *Id.* § 13804(a),

⁷⁴ *Id.*

tus, city of origin, domicile, address of policyholder, and names of all beneficiaries.⁷⁵ Furthermore, HVIRA mandated the creation of a central Holocaust Era Insurance Registry open to the public⁷⁶ and imposed mandatory penalties for default, including suspension of the insurance company's license to do business in California and possible misdemeanor criminal sanctions for knowingly misrepresenting the specifics of the actual distribution of policies.⁷⁷

2. *The Conflict Between HVIRA and Executive Agreements with Germany, France, and Austria*

Due to the flurry of lawsuits filed against European corporations in American courts over the past decade relating to allegedly unpaid insurance policies held by Holocaust victims, the U.S. government established a national claim resolution policy implemented through voluntary international agreement and negotiation, rather than litigation.⁷⁸ The U.S. and German governments hoped to forestall potentially endless litigation and provide the needed closure and restitution through the German Foundation Agreement⁷⁹ and the creation of the German Foundation, which would cooperate with the International Commission on Holocaust Era Insurance Claims (ICHEIC).⁸⁰ President Clinton and German Chancellor Schröder signed the German Foundation Agreement on July 17, 2000, with former Deputy Treasury Secretary Stuart E. Eizenstat playing a central role in the negotiations. In exchange for a "Statement of Interest"⁸¹ from the U.S. government indicating that it is in the foreign policy interests of the United States to resolve all claims against German companies outside the court system, the German government agreed to establish a 10

⁷⁵ *Id.*

⁷⁶ *Id.* § 13803.

⁷⁷ *See id.* § 13804(b).

⁷⁸ *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 405 (2003) (noting the government's belief that "endless litigation" would not produce a satisfactory outcome, and that international cooperation would provide greater relief for aging Holocaust survivors); MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 117-32 (2003) (describing the filing of early reclamation suits against European insurance companies).

⁷⁹ Agreement Concerning the Foundation, Remembrance, Responsibility and the Future, July 17, 2000, U.S.-F.R.G., 39 I.L.M. 1298 (2000) [hereinafter German Foundation Agreement].

⁸⁰ *See Garamendi*, 539 U.S. at 406-08.

⁸¹ German Foundation Agreement, *supra* note 79, at 1303-04. This "statement of interest" includes a statement from the President indicating his belief that dismissal is in the "enduring and high interest" of the United States, along with a formal foreign policy declaration of the Secretary of State and Deputy Treasury Secretary Stuart E. Eizenstat "in all pending and future cases." *Id.* at 1303. Furthermore, although the Agreement binds the government to submit such a statement, the statement would only favor dismissal on "valid legal grounds" and the U.S. government would not "suggest that its policy interests . . . in themselves provide an independent legal basis for dismissal." *Id.* at 1304.

billion deutschemark foundation to serve as the sole forum for the resolution of these claims.⁸²

The German Foundation also agreed to work with ICHEIC, an organization chaired by former Secretary of State Lawrence Eagleburger charged with negotiating with European insurers and settling unpaid Holocaust-era insurance claims.⁸³ In a supplemental agreement in October 2002, the German Foundation agreed to supply additional funding for ICHEIC's operating expenses as well as the settlement of claims under ICHEIC proceedings.⁸⁴ The German Foundation also committed to work towards the compilation and publication of a comprehensive list of Holocaust-era policy holders.⁸⁵ Perhaps the greatest legacy of the German Foundation Agreement, however, is that it served as the model for agreements with Austria and France.⁸⁶ These agreements were substantially similar to the German Foundation Agreement, although only the Austrian agreement contained a provision providing for the resolution of insurance claims.⁸⁷

While the German Foundation Agreement endeavored to address the insurance claims of Holocaust victims, the stringent requirements of California's HVIRA threatened to undermine the long-labored-over consensual agreement. Following HVIRA's passage and California's subsequent issuance of subpoenas against several subsidiaries of ICHEIC participants, Eizenstat wrote to the California Insurance Commissioner expressing both his and Chairman Eagleburger's strong opposition to HVIRA.⁸⁸ Eizenstat argued that HVIRA "damag[es] the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period" and "threatens to damage the cooperative spirit which [ICHEIC] requires to resolve the important issue for Holocaust survivors."⁸⁹ Speaking for Eagleburger, Eizenstat added that the Chairman opposed "sanctions and other pressures brought by California on companies with whom he is obtaining real cooperation."⁹⁰

Following the California insurance commissioner's indication that he would enforce HVIRA to its fullest extent, several American and European insurance companies and trade associations filed suit

82 *Garamendi*, 539 U.S. at 405-08; German Foundation Agreement, *supra* note 79.

83 *Garamendi*, 539 U.S. at 406-07.

84 *Id.*

85 *Id.*

86 *Id.* at 408.

87 *See id.* at 408 n.3.

88 *Id.* at 411 (Eizenstat wrote that while HVIRA "reflects a genuine commitment to justice for Holocaust victims and their families, it has the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, the [ICHEIC]." (alteration in original)).

89 *Id.*

90 *Id.*

in the Eastern District of California seeking injunctive relief. The district court appeared to accept the insurance entities' arguments and issued a preliminary injunction, reasoning that HVIRA was most likely unconstitutional.⁹¹ The Court of Appeals for the Ninth Circuit reversed a second time following remand and reasoned that HVIRA violated neither the foreign affairs nor the foreign commerce powers,⁹² and the Supreme Court granted certiorari.⁹³

B. The Majority Opinion

The Supreme Court reversed the Ninth Circuit and held that the federal foreign affairs power preempted HVIRA.⁹⁴ Justice Souter, writing for the majority in an opinion joined by four Justices, relied on a theory of obstacle (conflict) preemption and the inherent weakness of California's interest in legislating HVIRA.⁹⁵ The majority employed a balancing test, weighing the strength of the state interest in legislating in a certain arena against the clarity of the conflict between state and federal policy.⁹⁶ In other words, as a state's interest in legislating in certain areas weakens, the less clear the conflict between the two policies needs to be, and vice versa.

1. *Foreign Affairs and War Restitution as a Federal Interest*

The Court began by recounting the theory behind the federal foreign affairs power, a large part of which the dissent did not contest. For example, the majority discussed how state power must yield to the initiative of the national government to conduct foreign affairs, and detailed the generalized power of the President to conduct foreign affairs, the power of the President to effect executive agreements, and the fitness of these executive agreements to preempt state law.⁹⁷

⁹¹ The district court's preliminary injunction was predicated on the probability that HVIRA was unconstitutional under the federal foreign affairs power and the Commerce Clause. See *Gerling Global Reins. Corp. v. Quackenbush*, Nos. Civ. S-00-0506WBSJFM, Civ. S-00-0613WBSJFM, Civ. S-00-0779WBSJFM, Civ. S-00-875WBSJFM, 2000 WL 777978, at *14 (E.D. Cal. June 9, 2000). The Court of Appeals for the Ninth Circuit reversed and remanded for consideration of petitioner's due process claim, and the district court subsequently granted summary judgment for petitioner. See *Gerling Global Reins. Corp. v. Low*, 186 F. Supp. 2d 1099, 1108, 1113 (E.D. Cal. 2001) (holding that "mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing" violates due process).

⁹² *Gerling Global Reins. Corp. v. Low*, 296 F.3d 832, 845-49 (9th Cir. 2002).

⁹³ *Am. Ins. Ass'n v. Garamendi*, 537 U.S. 1100 (2003).

⁹⁴ *Id.* at 420-25.

⁹⁵ See *Garamendi*, 539 U.S. at 420-29.

⁹⁶ See *id.* at 420-25.

⁹⁷ See *id.* at 402-08, 413-17; *supra* Part II.A.2, II.B. The Court's discussion parallels this Note's previous background discussion on the theoretical basis for the foreign affairs power.

The majority also revisited *Zschernig* and refused to overturn this precedent.⁹⁸ The Court reasoned that there is no need to pass upon the question of whether *Zschernig* remained good law, as *Garamendi* presented a clear case of obstacle preemption.⁹⁹ Instead, in dicta, the Court addressed *Zschernig*'s contemporary relevance by framing the question of foreign affairs preemption as a dichotomy between obstacle and field preemption. The *Garamendi* fact pattern falls within the former, while the Court relegated *Zschernig* to the latter. Field preemption—which apparently would encompass what is normally recognized as dormant foreign affairs preemption—would be implicated “[i]f a state were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility” regardless of whether the national government had acted and without reference to any potential conflict between the two policies.¹⁰⁰ The Court recognized that “[v]indicating victims injured by acts and omissions of enemy corporations in wartime is within the traditional subject matter of foreign policy in which national, not state, interests are overriding,”¹⁰¹ but at the same time the Court did not assert that the national interest is exclusive. Thus, it does not fall within field preemption and the Court proceeded with its analysis under the theory of obstacle preemption.¹⁰²

2. *Obstacle Preemption: HVIRA Interferes with the Foreign Policy of the Executive Branch*

As the Court aptly observed, “[t]he basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves.”¹⁰³ In other words, the Court acknowledged that the negotiations towards the executive agreements illustrate a consistent presidential foreign policy squarely in conflict with HVIRA.¹⁰⁴

Since the end of World War II, the United States—through the President—has encouraged negotiation and settlement in this area.¹⁰⁵ A policy of swift settlement is preferred because it allows companies to abide by their national privacy laws, which may limit disclosure, and expeditiously resolves claims in light of the advanced age and dwindling number of remaining Holocaust survivors who would likely not

⁹⁸ See *Garamendi*, 539 U.S. at 417–20.

⁹⁹ *Id.* at 420.

¹⁰⁰ *Id.* at 419 n.11.

¹⁰¹ *Id.* at 421.

¹⁰² *Id.* at 421–24.

¹⁰³ *Id.* at 427.

¹⁰⁴ *Id.* at 420.

¹⁰⁵ *Id.*; see also *supra* notes 78–87 and accompanying text (detailing the negotiations preceding the German Foundation Agreement).

survive protracted litigation.¹⁰⁶ To that end, ICHEIC has existing procedures addressing the disclosure of policy information to encourage settlement.¹⁰⁷ In addition to the actual text of the agreements, consistent support for this policy is evinced by statements by Deputy Secretary Eizenstat and other high-level executive branch officials in congressional hearings.¹⁰⁸

Against this historical landscape, the majority compared the current case to *Crosby*, a case in which the Court found that a state action undercut “the President’s diplomatic discretion” by threatening to frustrate the mechanism by which he chose to resolve the conflict.¹⁰⁹ In short, the Court recognized that HVIRA makes it more difficult to persuade companies to participate in ICHEIC, undercuts European privacy protections, and thus directly conflicts with clear Presidential policy in this field.

3. *California’s Weak State Interest in Legislating*

Even assuming that the conflict between the two policies is not crystal clear, foreign affairs have traditionally been the domain of the federal government, and California has an exceedingly weak interest in legislation of this sort.¹¹⁰ Therefore, to the extent any doubt exists, any ambiguity should be resolved in favor of the federal government. The Court rejected the argument that HVIRA is a California consumer protection statute,¹¹¹ reasoning that the legislation is unrelated to any contemporary corporate reliability issues involving insurance companies operating in California.¹¹² Instead, the statute is nothing more than a thinly veiled attempt to ensure payment to Holocaust survivors—an established interest of the federal government that the President has chosen to accomplish by different means.¹¹³

This analysis introduced a balancing element into the Court’s obstacle preemption test. According to the majority, if there is little to no express conflict, the federal government can still preempt state action in the face of an even weaker state legislative interest. Moreover, if there is any argument as to the nature of the conflict, because foreign affairs is the domain of the federal government, the Court should resolve any ambiguity in favor of the federal government.¹¹⁴

¹⁰⁶ *Garamendi*, 539 U.S. at 422–23.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 422–23.

¹⁰⁹ *Id.* at 423–24.

¹¹⁰ *See id.* at 425–27.

¹¹¹ *Id.*

¹¹² *Id.* 426–27.

¹¹³ *Id.*

¹¹⁴ *Id.* at 425.

C. Justice Ginsburg's Dissent

In her dissent, Justice Ginsburg adopted a much more technical and discrete approach, in contrast to the majority's broader attempt at balancing. Justice Ginsburg relied primarily on the absence of an executive agreement or formal statement of foreign policy explicitly preempting state disclosure laws like HVIRA, and would require such a "clear statement" before requiring courts to defer to the "one voice" policy.¹¹⁵

1. *Limiting Preemption Doctrine to Explicit Executive Agreements*

In this vein, Justice Ginsburg disagreed with the majority regarding the extent to which certain executive agreements are accorded preemptive effect.¹¹⁶ Justice Ginsburg revisited *Belmont*, *Pink*, and *Dames & Moore*, remarking that until now the Court had reserved the preemptive status of an executive agreement for cases of express preemption and narrow judicial construction.¹¹⁷ Her point is that the German Foundation Agreement (along with its Austrian and French counterparts) does not specifically address—or even mention—public disclosure and therefore does not attain preemptive status requiring HVIRA to yield to another clear national policy.¹¹⁸

2. *Disputing the Majority's "Implied Preemption" Analysis*

In addition to noting the absence of a provision addressing information disclosure which would conflict with HVIRA, Justice Ginsburg cautioned against implied preemption and the lingering *Zschernig* notion of dormant ("field") preemption.¹¹⁹ Noting that *Zschernig* has not been relied on since it was decided, Justice Ginsburg essentially argued that *Zschernig* should be limited to its facts and should not be resurrected.¹²⁰ Moreover, in this case HVIRA "t[ook] no position on any contemporary foreign government and requires no assessment of any existing foreign regime," thus leaving it outside *Zschernig's*

¹¹⁵ *Id.* at 430 (Ginsburg, J., dissenting).

¹¹⁶ *See id.* at 436–43 (Ginsburg, J., dissenting).

¹¹⁷ *Id.* at 436–38 (Ginsburg, J., dissenting). Justice Ginsburg discussed each in turn, remarking that *United States v. Belmont*, 301 U.S. 324 (1937), concerned claims assigned under the Litvinov Assignment and a foreign policy that explicitly preempted state policy in the letter of the agreement; *United States v. Pink*, 315 U.S. 203 (1942), again concerned state-imposed obstacles to Litvinov and held that both the assignment itself and a later exchange of diplomatic correspondence clarifying its scope militated in favor of preemption; *Dames & Moore v. Regan*, 453 U.S. 654 (1981), concerned claims arising out of the Iran Hostage Crisis and referred claims to a tribunal for arbitration if they were not settled in six months. *Caramendi*, 539 U.S. at 436–38 (Ginsburg, J., dissenting).

¹¹⁸ *Caramendi*, 539 U.S. at 436–38 (Ginsburg, J., dissenting) ("Indeed, no agreement so much as mentions the HVIRA's sole concern: public disclosure.")

¹¹⁹ *See id.* at 439–42 (Ginsburg, J., dissenting).

¹²⁰ *Id.* at 439 (Ginsburg, J., dissenting).

scope.¹²¹ Since *Pink, Belmont, and Dames & Moore*—all of which address “express preemption”—do not support implied preemption by executive agreement, there is no basis in existing precedent for the majority’s decision.¹²²

In addition, the dissent questioned the majority’s reliance on statements “of individual sub-Cabinet members of the Executive Branch.”¹²³ The dissent cited *Barclays Bank PLC v. Franchise Tax Board*,¹²⁴ which held material such as press releases, letters, and amicus briefs insufficient to justify preemption under the foreign commerce clause.¹²⁵ Thus, Justice Ginsburg would require a formal and binding federal instrument, rather than an executive official’s mere statement of presidential policy, to permit preemption.¹²⁶

III

THE STATUS OF PREEMPTION LAW AFTER *GARAMENDI*

The *Garamendi* decision does not remedy the confusion permeating the law of foreign relations and the concept of foreign affairs preemption. Given the emphasis that the Court placed on the statute’s interference with the President’s foreign policy goals, the Court’s approach is best characterized as an application of obstacle preemption.¹²⁷ The *Garamendi* decision does not define the scope of this theory, however, and places no limits on the interpretive possibilities of implied preemption or the continued applicability of the dormant foreign affairs concept implicated in *Zschernig*. Nevertheless, it is possible to draw several conclusions from the Court’s decision.

¹²¹ *Id.* at 439–40 (Ginsburg, J., dissenting).

¹²² Indeed, Justice Ginsburg asserted that there still remains a question over whether the German Foundation Agreement and its progeny even require that Holocaust insurance litigation be removed from American courts. *See id.* at 432–34 (Ginsburg, J., dissenting). Given that foreign policy statements the President agreed to file with the court pursuant to the agreement are not binding, the negotiators may have intended to leave the agreement ambiguous. *Id.* (Ginsburg, J., dissenting). If the agreements are ambiguous to that effect, then they are not clear enough to preempt state disclosure laws, which are not mentioned. *Id.* at 440–41 (Ginsburg, J., dissenting) (“Indeed, ambiguity . . . appears to have been the studied aim of the American negotiating team.”).

¹²³ *Id.* at 441–42 (Ginsburg, J., dissenting).

¹²⁴ 512 U.S. 298 (1994).

¹²⁵ *Garamendi*, 539 U.S. at 442 (Ginsburg, J., dissenting) (“[W]e have never premised foreign affairs preemption on statements of that order.” (citing *Barclays Bank*, 512 U.S. at 329–30)).

¹²⁶ *Id.* (Ginsburg, J., dissenting).

¹²⁷ *See supra* Part II.B.2.

A. No Retreat to Statutory Formalism

First, the Court avoided the formalist theory of statutory interpretation that Justice Ginsburg advocated in her dissent.¹²⁸ Justice Ginsburg seemed to be endorsing—at least with regard to executive agreements—a theory of express preemption.¹²⁹ Even the most ardent “revisionists” do not take their argument for the restriction of preemption to this extreme, instead confining their criticism to the idea of dormant foreign affairs preemption and the federal common law of foreign relations.¹³⁰ This could be explained by a concern about the extent of the power implied preemption would grant to the executive branch. Nevertheless, it is just as probable that Justice Ginsburg was concerned about the possible extension of the dormant foreign affairs preemption doctrine under the guise of “statutory interpretation.”¹³¹ Thus, considering the absence of an express intent to preempt state laws and the absence of any reference to disclosure laws in the executive agreement to provide an express policy conflict, the effect of the *Garamendi* Court’s preemption theory may, in effect, approach that of its dormant cousin.¹³²

¹²⁸ The vehemence with which Justice Ginsburg attacked the “implied preemption” analysis is surprising, especially considering the company with whom she joins: Justices Scalia and Thomas, who have a known penchant for the formalist theory of interpretation.

¹²⁹ *Garamendi*, 539 U.S. at 438 (Ginsburg, J., dissenting).

¹³⁰ See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1712 (1997) [hereinafter Goldsmith, *Federal Courts*]; Goldsmith, *Statutory Preemption*, *supra* note 11, at 213 (arguing that the prime motivator for obstacle or field preemption should be harm to political branch enactments and that field and obstacle preemption are not “per se illegitimate”). Therefore, because Goldsmith advocates for several of its forms, he does not appear to oppose implied preemption. See *supra* notes 22–30 and accompanying text. Goldsmith might, however, contest the legitimacy of Justice Souter’s “presumption of preemption” or “presumption against preemption” invoked in the Court’s balancing test. See Goldsmith, *Statutory Preemption*, *supra* note 11, at 177, 182–88 (discussing the question of whether “preemption analysis [should] indulge a presumption in favor of the federal government’s strong national interest in conducting foreign affairs”). The revisionists contest foreign affairs “exceptionalism,” arguing that a federal statute with foreign affairs implications should not be entitled to any more “deference” under a preemption analysis than any other federal statute. See Ramsey, *supra* note 21, at 1116–19. The majority seemed to invoke this presumption in adopting a test where the weaker the state interest (e.g., in “foreign affairs”), the lesser the conflict necessary to preempt under a federal statute. See *supra* Part II.B.2–3.

¹³¹ The words “statutory interpretation” are placed in quotations to recognize that *Garamendi* deals not with the interpretation of a statute, but rather with the interpretation of an executive agreement. Nevertheless, the issue could arise with regard to either an executive agreement or statute. For a discussion of how statutory interpretation can be viewed as disguised preemption law, see Vázquez, *supra* note 60, at 1266–1304.

¹³² The majority opinion makes no effort to limit the scope of interpretation of an executive agreement to arrive at the conclusion of conflicting policy and “implied preemption.”

B. Dormant Foreign Affairs Preemption: Neither a Wholehearted Endorsement Nor the Death Knell Sought by "Revisionists"

From the perspective of an opponent of dormant foreign affairs preemption, Justice Ginsburg's concerns regarding the *Garamendi* opinion are valid. In footnote 11, the Court declined to address the question of dormant or, in the majority's words, "field" preemption.¹³³ Nevertheless, the majority opinion resurrected *Zschernig* and provided a tacit, if limited, endorsement.

The Court observed that "[i]t is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions, but the question requires no answer here."¹³⁴ In footnote 11, which may imply support for *Zschernig* and dormant preemption, the majority offered an example in which foreign affairs preemption might be proper even in the absence of conflicting federal policy.¹³⁵ Such a case would arise "if a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility."¹³⁶ This proposition, however, does not follow from *Zschernig*, which is premised on the idea that any state action with more than incidental effects on foreign affairs is preempted regardless of whether or not the federal government has acted.¹³⁷ *Garamendi*, on the other hand, seems to indicate that, in the absence of conflicting federal action, dormant foreign affairs preemption is possible if the state's action affects foreign affairs *without addressing a "traditional state responsibility."*¹³⁸ Consequently, it is conceivable that, under the majority's analysis, a state regulation that affects foreign affairs but also regulates a "traditional state responsibility" could survive a *Garamendi* analysis.

While the Court refused to kill off *Zschernig*, it did not completely clarify it. The majority's efforts to address dormant preemption are too vague to be successful, and its field preemption theory and obstacle preemption balancing analysis ignore the problem of discerning

¹³³ See *Garamendi*, 439 U.S. at 419 n.11; *supra* notes 94–102 and accompanying text.

¹³⁴ *Garamendi*, 539 U.S. at 419–20 (footnote omitted). The majority arguably missed a chance to harmonize the two doctrines by devising a balancing test in which both apply.

¹³⁵ *Id.* at 419 n.11.

¹³⁶ *Id.*

¹³⁷ See *supra* notes 50–56 and accompanying text; *Garamendi*, 539 U.S. at 417–19.

¹³⁸ *Garamendi*, 539 U.S. at 419 n.11. One can argue that the majority's interpretation of the *Zschernig* doctrine is what the Court actually had in mind when it decided the case. Emily Chiang points out that "although *Zschernig* is frequently reduced to the 'indirect and incidental effects' test, the Court also noted that the statute at issue attempted to engage in a forbidden state activity, and that it would impair the effective exercise of the nation's foreign policy." Chiang, *supra* note 39, at 966.

state and federal areas of supremacy.¹³⁹ As such, the decision does not come close to setting a clear standard articulating when a state action sufficiently affects foreign affairs to necessitate preemption.¹⁴⁰

C. The "Right Decision" From a "Results-Based" Standpoint

As a matter of policy, it seems evident that the Court arrived at the "right" decision in this case and realized the intent of the drafters of the German Foundation Agreement.¹⁴¹ The statements of former Deputy Secretary Eizenstat and Chairman Eagleburger indicate that HVIRA is the kind of state statute the drafters hoped to avoid in order to maintain a cooperative spirit in settling Holocaust survivor insurance claims and forestalling litigation.¹⁴² Although the German Foundation Agreement and its Austrian and French counterparts do not prohibit, or even address, HVIRA's disclosure laws, the accompanying sanctions under state law for failure to comply would arguably undermine the U.S. government's policy of encouraging out-of-court settlements and resolution through participation in ICHEIC.¹⁴³ It would logically follow that the state policy would have a negative effect on the executive's conduct of foreign affairs and stated policy. Nevertheless, this results-based reasoning is neither a sufficient justification for the Court's decision nor sound jurisprudence. The Court should not, from a doctrinal standpoint, adopt an expansive concept of foreign affairs preemption in one case and a formalist interpretation in another—even if the respective outcomes are desirable from a policy standpoint.

The Court's current obstacle preemption analysis requires courts to apply an extensive, fact-laden balancing test. Rather than solely looking to the text of the executive agreement, a court must also determine the intended scope of the underlying policy. Similarly, the Court's dormant preemption doctrine also necessitates a judicial determination of national foreign policy, sometimes without the assistance of any articulated federal position. Thus, the *Garamendi* opinion begs the overall question: is an expansive preemption doctrine a sound proposition?¹⁴⁴

¹³⁹ See Chiang, *supra* note 39, at 990.

¹⁴⁰ *Id.* at 985–90.

¹⁴¹ See German Foundation Agreement, *supra* note 79.

¹⁴² See *supra* notes 69–78 and accompanying text.

¹⁴³ See *Garamendi*, 539 U.S. at 403–08.

¹⁴⁴ Most of the critiques and arguments for an "expansive" preemption doctrine mirror those made for and against dormant foreign affairs preemption. The term "expansive" was chosen to include an analysis of both dormant foreign affairs preemption and the type of obstacle preemption adopted in the *Garamendi* case and opposed by Justice Ginsburg.

IV

LAYING THE FRAMEWORK FOR SOUND DEVELOPMENT
IN THE LAW OF FOREIGN RELATIONS

Although the current, vague standard of preemption embraced by the Supreme Court in *Garamendi* is not without problems, the alternative—the notion that foreign affairs preemption should be confined to cases of express conflict—is even less desirable. Implied and even dormant preemption are better options, which can be narrowly tailored to work without sacrificing the flexibility needed to respond to state interference with federal responsibilities.

A. Objections to an Expansive Preemption Theory

Although the majority of the critiques discussed were developed to address the concept of dormant foreign affairs preemption, they also apply to the type of “implied” preemption present in *Garamendi*.¹⁴⁵

1. “Textualist” or “Originalist” Critique

Nearly all critiques of expanded foreign affairs preemption mention the lack of “textual” or “original” constitutional support for the doctrine.¹⁴⁶ No matter how convenient an expanded doctrine of preemption may be, these critics argue, such a practice is unconstitutional because it empowers the judiciary to preempt in the absence of sufficient textual guidance from the political branches.¹⁴⁷ Although originalist constitutional arguments tend to devolve into inconclusive doctrinal disputes, the arguments warrant at least brief mention.¹⁴⁸

Critics of the dormant preemption doctrine assert that the constitutional argument for a “self-executing exclusion of state authority” from foreign affairs is without merit.¹⁴⁹ Although the Constitution assigns certain enumerated foreign relations powers to the federal gov-

¹⁴⁵ See Goldsmith, *Statutory Preemption*, *supra* note 11, at 212–13 (arguing that “courts can, under the rubric of obstacle or field preemption, insert independent judicial conceptions of U.S. foreign relations interests”); see also Vázquez, *supra* note 60, at 1266 (re-marking that “there is no bright line between federal common law and ‘mere’ statutory interpretation”).

¹⁴⁶ See Goldsmith, *Federal Courts*, *supra* note 130, at 1642; Pascoe, *supra* note 38, at 307–08; Vázquez, *supra* note 60, at 1305–08.

¹⁴⁷ See Vázquez, *supra* note 60, at 1275 (referring to *Crosby* and remarking that “[i]n both cases [dormant and obstacle preemption] state law is being displaced in the face of congressional silence”).

¹⁴⁸ See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 238–43 (2001) (tracing the various disputes over the sources of foreign affairs power and their rightful allocation among the various branches of government and remarking that the text of the Constitution is ultimately inconclusive on this issue).

¹⁴⁹ Goldsmith, *Federal Courts*, *supra* note 130, at 1641–42.

ernment and keeps several from the states,¹⁵⁰ there is no evidence to support an intended, judicially enforceable exclusion.¹⁵¹ Goldsmith argues that although the Framers intended to strengthen the foreign relations powers of the federal government after the disastrous Articles of Confederation, they did so by empowering the federal government to *act* through these enumerated powers, and to ensure state compliance with their enactments by virtue of the Supremacy Clause or a clear indication of preemptive intent.¹⁵² It follows, according to this theory, that any sort of preemption without an affirmative federal enactment—and even obstacle preemption where the determination of preemptive intent is not grounded in the text or background of an enactment—is without constitutional basis.

2. *Structural and Policy Arguments*

Structural and policy critiques focus on the desirability of a strict federal foreign affairs preemption regime, paying special attention to the nature of the international system which has changed significantly over the past fifteen years. The nature of the global economy has changed, and so has the relationship between state, local, and federal governments.¹⁵³

Structural critics argue that a uniform foreign policy established by the federal government is no longer of great importance and that state intervention in foreign affairs is tolerable due to the end of the Cold War and globalization.¹⁵⁴ State and local governments now have more direct contact with foreign states, and in some cases foreign states prefer to deal with them.¹⁵⁵ Furthermore, some scholars suggest that state missteps are no longer catastrophic because, with the demise of the Soviet bloc, the “imperative of national defense”¹⁵⁶ has dissipated and “survival is no longer so clearly at stake in foreign relations decision making.”¹⁵⁷ Along the same lines, some commentators

¹⁵⁰ *Supra* notes 5–12 and accompanying text.

¹⁵¹ Goldsmith, *Federal Courts*, *supra* note 130, at 1641–43.

¹⁵² It is of some note that the courts did not recognize any state exclusion during the country's first 175 years. *Id.* at 1645.

¹⁵³ Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1247–48 (1999).

¹⁵⁴ Vázquez, *supra* note 60, at 1308; *see also* Goldsmith, *Federal Courts*, *supra* note 130, at 1676–77 (“In short, foreign relations is no longer a district issue area: it is something and that something has come to embrace an increasingly large number of issues once assumed to be the presence of domestic politics.” (internal quotation marks omitted)).

¹⁵⁵ *See generally* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 719–20 (2002) (providing an extensive discussion of how globalization has transformed foreign affairs federalism, bringing the component parts of the United States—such as the individual states themselves—to the forefront and allowing other actors on the international stage to maintain a direct relationship).

¹⁵⁶ Spiro, *supra* note 153, at 1275.

¹⁵⁷ *Id.* at 1223–24.

argue that the resulting global environment is such that there is no longer a need to guard against national retaliation for the actions of individual states.¹⁵⁸ Instead, it is more likely that foreign states offended by the acts of individual American states will direct their retaliation against those states rather than the nation as a whole.¹⁵⁹

The policy critiques are less forceful than the legal arguments against preemption. The most common objection is that an expansive concept of foreign affairs preemption foils state attempts to improve human rights conditions abroad.¹⁶⁰ Given that local economies have direct contact with foreign states, many argue that state and local governments should take the lead in protesting human rights abuses.¹⁶¹ Moreover, some also assert that state participation at the foreign affairs level permits the injection of "more democracy" into foreign affairs decisionmaking, since the force behind many of these state humanitarian statutes are concerned citizens or special interest groups.¹⁶²

These same individuals would cite the *Crosby* Court's invalidation of the Massachusetts Burma Law as a prime example of a noble state action invalidated by an overactive federal judiciary.¹⁶³ Justice Ginsburg's dissent in *Garamendi* provides another possible illustration. While she framed her argument in terms of a lack of express preemption or any clear intent to preempt, it appears that her desire for greater formalism partially stems from a popular concern for the fate of Holocaust victims residing in California and the potential benefit of the information clearinghouse HVIRA's forced disclosure provisions establish.¹⁶⁴

¹⁵⁸ *Id.* at 1261–64.

¹⁵⁹ *Id.* (detailing Mexico's sanctions against California in retaliation for its immigration policy, Japan's possible sanctions against Massachusetts for its anti-Burma law, as well as the European and Canadian action against Texas for the way in which it administers the death penalty).

¹⁶⁰ Vázquez, *supra* note 60, at 1315.

¹⁶¹ Denning & McCall, *supra* note 39, at 11 (also noting that "states compete for foreign business, many states with large urban cities host foreign consulates, and some contain large numbers of resident aliens or recent immigrants who retain close ties to their homelands").

¹⁶² Pascoe, *supra* note 38, at 315; see also Denning & McCall, *supra* note 39, at 11 (discussing the role of nongovernmental organizations in replacing elite foreign policymaking with a decentralized grassroots movement).

¹⁶³ See *supra* notes 31–35 and accompanying text.

¹⁶⁴ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 430–33 (2003) (Ginsburg, J., dissenting) (first enumerating the unquestionable evils perpetrated by European insurance companies during the 1930s and 1940s, then discussing the difficulties of obtaining results through the U.S. court system and ICHEIC, and explaining the potential benefits of a public claim database established under the HVIRA).

3. *Functional Critiques*

Functional critiques of expanded foreign affairs preemption, perhaps the most valid, claim that the doctrine relies too much on judicial discretion in a domain for which judges are not trained. The practice requires judges to look beyond the law and make policy determinations, ranging from determinations of what the policy actually is to evaluating potential differences in policies.¹⁶⁵ This critique is the most pointed with regard to critiques of dormant foreign affairs preemption and federal common law, yet it is equally applicable to some forms of obstacle preemption, arguably including that applied in *Garamendi*.

Goldsmith is perhaps the most vocal champion of "judicial minimalism" with regard to foreign affairs issues.¹⁶⁶ Rather than possessing the informed decisionmaking capabilities of the political branches, Goldsmith argues that the judiciary lacks institutional competence and makes "unguided intuitive judgment[s]" in the foreign affairs arena.¹⁶⁷ Even if a judge attempts to inform herself, the complexity of such issues—and the judge's lack of training—will likely lead to error.¹⁶⁸

There are several instances in which judicial incompetence may manifest itself. First, judges may have difficulty distinguishing foreign affairs from domestic in a globalized world: "The waning of the distinction between domestic and foreign affairs means that just about any state law, when applied in a case involving a foreign element, is potentially subject to judicial preemption."¹⁶⁹ Not only does this pose important federalism issues, but once judges determine that legislation implicates foreign affairs, they must apply a multifactor analysis, taking into account the U.S. foreign policy on the subject, the state legislation's potentially adverse effects on that policy, the state legisla-

¹⁶⁵ Goldsmith, *Federal Courts*, *supra* note 130, at 1668–69.

¹⁶⁶ Goldsmith, *Statutory Preemption*, *supra* note 11, at 208 (clarifying that by "minimalism," Goldsmith means that "courts should eliminate . . . any independent judicial consideration of the foreign relations consequences of preemption" and "courts should make the decision to preempt on the narrowest possible ground, which . . . is rarely broader than obstacle preemption of a particular sort").

¹⁶⁷ Goldsmith, *Federal Courts*, *supra* note 130, at 1690–91 (

Once this intuitive judgment has been satisfied, [courts] conclude, without further analysis, that the issue must be governed by uniform federal law. And the context of this law, like the basis for judicial federalization, is rarely (if ever) informed by an analysis of the actual foreign relations policies of the political branches.

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¹⁶⁸ *Id.* at 1692–93.

¹⁶⁹ Goldsmith, *Statutory Preemption*, *supra* note 11, at 210; *see also* Goldsmith, *Federal Courts*, *supra* note 130, at 1671 (describing the changing nature of foreign affairs and the integration of non-traditional considerations such as trade, investment, technology and energy transfers, environmental and social issues).

tion's potential adverse effect on foreign policy in general, as well as the state's own interest in legislating in the first place. By adding more factors into the equation, globalization and the advent of decentralized economies make it more difficult to balance the benefits of increased state control against the benefits of a centralized foreign policy.¹⁷⁰

In light of the infirmities of judicial decisionmaking in the foreign affairs arena, it thereby follows that any decisions made by the judiciary are removed from the competency of the more qualified political bodies.¹⁷¹ Even though judicial preemption does not preclude political action to correct erroneous judicial interpretations, a more active role for the courts may exacerbate the inaction of the executive and legislative branches, making them even less likely to exercise their responsibilities and powers relating to foreign affairs.¹⁷² Therefore, using foreign affairs preemption to remedy political branch inertia may result in a cure worse than the disease.¹⁷³

B. Justifying Expansive Preemption: Limited Judicial Discretion as the Lesser of Many Evils

1. A Sound Constitutional Basis

Although many of these concerns support valid criticism, the benefits of a uniform foreign policy outweigh the problems of an expanded preemption doctrine. Proponents of a strong preemption power cite the existence of a well-grounded, constitutional federal foreign affairs power. The foreign affairs powers the Constitution grants to the federal government, the Article I restrictions imposed upon the states, and the commentary of several Framers suggest that the Framers intended the federal government to have strong control over foreign affairs.¹⁷⁴ Madison's urgings in *Federalist 42* that "[i]f we are to be

¹⁷⁰ See Goldsmith, *Federal Courts*, *supra* note 130, at 1670–80 (discussing the increased complexity of foreign affairs in a global society due to the recent development of substantial subnational foreign relations activity).

¹⁷¹ For a discussion of how this functionalist argument merges into the structural and policy arguments with separation-of-powers implications, see Curtis A. Bradley, *World War II Compensation and Foreign Relations Federalism*, 20 BERKELEY J. INT'L L. 282, 283–88, which argues that with regard to foreign affairs, judicial decisionmaking bypasses procedural safeguards of the legislative process, producing a lack of political accountability and democratic legitimacy. See Goldsmith, *Federal Courts*, *supra* note 130, at 1667–68.

¹⁷² See Goldsmith, *Statutory Preemption*, *supra* note 11, at 210–11.

¹⁷³ See *infra* notes 181–85 and accompanying text.

¹⁷⁴ This decision to centralize the foreign affairs power in a strong national government is likely attributable to the Framers' experience under the ineffective Articles of Confederation. See Denning & McCall, *supra* note 39, at 13–14 (noting that Justice Story wrote that Americans were victims of their own "imbecility" under the Articles of Confederation by consistent state interference in foreign policy); Vázquez, *supra* note 60, at 1306–07 (discussing *Zschernig* supporters' claims that the Framers intended to "design a government that would not be subject to the problems that states had created for the Confederation

one nation in any respect, it clearly ought to be in respect to other nations"¹⁷⁵ and Hamilton's remark in *Federalist 80* that "the peace of the WHOLE ought not to be left at the disposal of a PART"¹⁷⁶ indicate that the Framers intended the federal government to be the sole organ of foreign policy. Any claim to the contrary "epitomizes interpretive literalism at its most wooden and ignores the historical context in which constitutional powers were assigned."¹⁷⁷

Even assuming *arguendo* that the constitutional basis for dormant or obstacle/field preemption is weak, *stare decisis* considerations support obstacle/field preemption because continuity of a long-recognized doctrine promotes stability and predictability in the law.¹⁷⁸ Vázquez illustrates the confusion that would result should the courts reject expansive preemption and require more express forms of preemption, intimating that in *Crosby* Congress may have omitted an explicit reference to preemption (such as a preemption clause) in reliance on a preemption theory, which the Court upheld.¹⁷⁹ As such, if the Supreme Court had required such an express indication, it would have thwarted congressional intent.¹⁸⁰

Given the strength of the constitutional background and *stare decisis* considerations, a strong foreign affairs preemption doctrine remains a legitimate exercise of the federal courts' duty to police the boundaries between state and federal power.

2. *Good Structure, Good Policy*

As the previous section demonstrated, substantial constitutional support for foreign affairs preemption doctrine exists. In addition to this strong historical context, the preemption power remains particularly wise as a policy matter following the attacks of September 11, 2001 and the war in Iraq. The end of the Cold War notwithstanding, the United States arguably faces far more numerous—and much less predictable—dangers. In the interest of maintaining a strong, yet flexible, foreign policy it becomes necessary to exclude the states from

through their parochial foreign affairs activities" under the problems of the Articles of Confederation).

¹⁷⁵ THE FEDERALIST NO. 42, at 264 (James Madison) (Arlington House 1966).

¹⁷⁶ THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Arlington House 1966).

¹⁷⁷ Denning & McCall, *supra* note 39, at 12; see also Chiang, *supra* note 39, at 935 (remarking that "the usual structural assumptions for internal affairs may not hold in the context of foreign affairs").

¹⁷⁸ Vázquez, *supra* note 60, at 1307 (qualifying this argument with the assertion that dormant foreign affairs preemption is a subconstitutional issue, and therefore *stare decisis* should play a stronger role).

¹⁷⁹ *Id.* at 1308.

¹⁸⁰ *Id.*

an area in which they have no legitimate role.¹⁸¹ Since the nation's founding, the United States has had a strong interest in other nations perceiving U.S. foreign policy as uniform.¹⁸² For example, should foreign governments perceive that state policy could undermine the national position, the resulting uncertainty would jeopardize the credibility of the federal negotiations and policies at an international level.¹⁸³ Indeed, if U.S. negotiators in the *Garamendi* context had been unable to convince the German government and insurance companies that there was a strong possibility that their statement of interest in dismissal would be given effect in the national courts, the German Foundation Agreement may never have been signed.¹⁸⁴

Keeping states out of the realm of foreign relations protects U.S. foreign policy interests for another reason. State and local activities can also impute hostility towards foreign nations' citizens or economic interests, and therefore interfere with U.S. foreign relations.¹⁸⁵ Although foreign states may choose "targeted retaliation" as a more effective means of dealing with the problem, it is not clear that there is any national benefit to having foreign states deal directly with the individual U.S. states.¹⁸⁶ This phenomenon, which the Founding Fathers hoped to avoid, and which one scholar suggests will cause national disintegration, can in no way be good for the United States.¹⁸⁷ Furthermore, retaliation tends not to be targeted.¹⁸⁸ For example, the World Trade Organization lodged a complaint against the United States regarding the Massachusetts Burma law. Additionally, a retaliatory boycott by a "major Swiss retailer" affected states who had not initiated local sanctions for that country's failure to release Holocaust-era bank accounts.¹⁸⁹ Moreover, in cases like *Garamendi*, the logic of the targeted retaliation argument would not apply. The most likely form of retaliation would be the insurance companies' refusal to cooperate with ICHEIC, which damages U.S. foreign policy and jeopardizes the claims of an ever-dwindling number of Holocaust survivors—including those in states other than California.

181 See Chiang, *supra* note 39, at 957 (stating that pro-preemption scholars argue that states becoming involved in foreign affairs can create "disorder and uncertainty" and an unfavorable response); see also H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 548 (1999) ("[T]he actual conduct of foreign affairs . . . reflects a complex interplay between international events, policy goals, political concerns, and legal arguments rather than the straightforward execution of anyone's constitutional vision.").

182 See Pascoe, *supra* note 38, at 314.

183 *Id.*

184 See *supra* notes 78–85 and accompanying text.

185 See Pascoe, *supra* note 38, at 314.

186 Cf. Vázquez, *supra* note 60, at 1311–12.

187 *Id.*

188 See *id.* at 1311.

189 Denning & McCall, *supra* note 39, at 13.

The policy arguments alleging that foreign affairs preemption prevents beneficial state action that could improve human rights abroad are also without merit,¹⁹⁰ even if such sanctions were more effective than their federal counterparts. The wisdom of allowing such sanctions to stand is a political question that the political branches—not the courts—must answer.¹⁹¹ Moreover, the political branches have the power to allow similar state sanctions to stand, protecting them from preemption by clearly indicating that intent.

C. Functional Justifications and Workable Problems

Structural and policy concerns mandate that a strong federal preemption power exist, and functional concerns dictate that the federal judiciary must play some role in implementing this policy.¹⁹² The most efficient way to ensure that states respect the national prerogative in foreign affairs is for the courts to vigilantly police the boundaries between federal and state powers.¹⁹³ Simply because the political branches can act to affirmatively exclude the states with a clear preemption clause does not mean that such action is the only—or best—means of accomplishing the goal.

Requiring such an affirmative statement of intent to preempt is not the best way to achieve these goals. The legislative process is onerous; the Constitution made it that way in order to protect state prerogatives with regard to federal legislation. In the high-stakes world of foreign affairs, Congress or the President often cannot effectively respond to offensive state activity before adverse consequences occur.¹⁹⁴ Moreover, Congress still provides a preventative cushion in cases of judicial overstep with the ability to enact subsequent remedial legislation governing whether a type of statute is preempted.¹⁹⁵

The more valid functional critiques come into play concerning the relative institutional competencies of the federal courts and the political branches.¹⁹⁶ Specifically, many commentators doubt that the

¹⁹⁰ See Vázquez, *supra* note 60, at 1315–16.

¹⁹¹ See *id.* at 1316; see also Chiang, *supra* note 39, at 940 (“A principled evaluation of these laws . . . requires that we distinguish between support for the substantive goals of a state or local statute and the question of the validity of the statute itself given our federal system.”).

¹⁹² *Id.*

¹⁹³ Denning & McCall, *supra* note 39, at 13 (noting that “policing the demarcation between federal and subfederal governments . . . is the appropriate province of the judiciary”).

¹⁹⁴ Vázquez, *supra* note 60, at 1310.

¹⁹⁵ Chiang, *supra* note 39, at 962; Vázquez, *supra* note 60, at 1323 (suggesting “that the states are perfectly capable of making their preferences felt and achieving the reversal in the political process of any judicial decision holding a class of state laws preempted as likely to unduly interfere with foreign relations”).

¹⁹⁶ See Chiang, *supra* note 39, at 957.

federal courts are competent to make decisions relating to foreign affairs.¹⁹⁷ These critiques, although valid, are often overemphasized. They ignore that the concept of foreign affairs preemption “does not license the courts to make foreign policy;”¹⁹⁸ rather, it requires them to ensure that only the *national* political branches conduct foreign policy.¹⁹⁹ Nevertheless, one can argue that in the course of performing these duties, courts must exercise some foreign policy judgment, determining whether a state action affects foreign relations and the extent to which it does.²⁰⁰

Such criticism should not be ignored. It can, however, be addressed by a reformulation of existing doctrine—specifically dormant foreign affairs preemption—in a more categorical vein.²⁰¹ The obstacle preemption in *Garamendi* demonstrates a step in the right direction, although the opinion fails to articulate this progress.

Traditionally, the idea of obstacle preemption has not been as controversial as its dormant cousin, despite the “implied” nature of the preemptive intent.²⁰² Most have attributed this tolerance to the fact that preemption of state or local action remains grounded in an existing federal enactment on the same subject.²⁰³ Institutional competence objections are largely without merit because courts can look to legislative history, diplomatic communiqués, drafts of executive agreements, and statements submitted to the court by the parties involved in forging the federal act. These processes amount to nothing more than hearing evidence, which courts are uniquely qualified to do. For example, the *Garamendi* Court—which considered evidence such as legislative hearings, accounts of negotiations of the settlement agreements, executive agreements, and *amicus curiae* briefs—demonstrates how a court may use many available tools in reaching a decision as to whether the two policies conflict, thus rendering the institutional competency argument irrelevant.²⁰⁴

The functional issues surrounding the concept of dormant preemption are more troubling. Courts may be poorly situated to make determinations of foreign policy where no previous embodiment of

¹⁹⁷ See *supra* notes 157–68 and accompanying text.

¹⁹⁸ Vázquez, *supra* note 60, at 1318 (emphasis added).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See *id.* at 1316.

²⁰² See Goldsmith, *Statutory Preemption*, *supra* note 11 (stating that foreign affairs preemption of state law is more legitimate the greater the extent of political branch guidance and the lesser the extent of independent judicial foreign policy analysis, thus placing obstacle preemption higher on the legitimacy scale than dormant preemption).

²⁰³ *Id.* at 207.

²⁰⁴ See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420–27 (2003); cf. *supra* notes 114–18 and accompanying text.

federal policy exists in the form of a statute or executive agreement.²⁰⁵ This problem, however, does not require a wholesale abandonment of the doctrine. Courts can remedy problems of dormant preemption through categorization²⁰⁶ and restriction of the scope of *Zschernig*. This omission is *Garamendi*'s great failure—with the decision leaving the future of *Zschernig* undecided but in doubt, given the Court's vague "balancing test" involving state and national interests.²⁰⁷ Such an exercise of discretion may be appropriate in the context of the Court's obstacle preemption balancing test in which the national interest is evident and the state's interest in legislating can be weighed against a clearly conflicting national policy. Where, however, the balancing test is reduced to comparing state interest to vague notions of national policy, or where a judge must determine areas in which states have "no interest," such judicial discretion becomes an unpredictable and unattractive alternative.²⁰⁸

Several commentators have proposed the creation of formal categories to make *Zschernig* more applicable, predictable, and consistent by creating rules invalidating a "particular *category* of state law that the Court concludes is especially likely to cause foreign relations problems."²⁰⁹ If the political branches feel such a category is over- or under-inclusive, Congress can always correct the problem with legislation revising the category or eliminating it. For example, some commentators propose a bright-line rule preempting state laws which are, on their face, directed at a foreign nation or groups of foreign nations.²¹⁰ Others support bright-line rules which preempt state action not directed at foreign states on its face, but nonetheless have undesir-

²⁰⁵ See Vázquez, *supra* note 60, at 1318.

²⁰⁶ See *id.* at 1318–19. Vázquez actually refers to increased "formalism" in dormant foreign affairs preemption, and recommends categorization as a move towards formalism. The analysis tries to avoid overuse of the word "formalism" in this analysis, so the reader will not confuse increased categorization and predictability with the type of formalism advocated by Justice Ginsburg, who propounds a wholesale abandonment of the dormant preemption doctrine in favor of express preemption by statute or executive agreement. See *supra* Part II.B, III.A.

²⁰⁷ See *supra* Part II.B, III.A.

²⁰⁸ Vázquez, *supra* note 60, at 1318 (observing that "given the open-ended nature of the inquiry, vesting the judiciary with such authority undermines the rule of law values of certainty, predictability and consistent treatment of like cases").

²⁰⁹ *Id.* at 1319; see also Chiang, *supra* note 39, at 980 (proposing the creation of bright-line rules). For an example of a court attempting to categorize areas of foreign affairs as "forbidden" to states, see *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003). The *Deutsch* court conceded the imprecise scope of the federal "foreign relations power," but stated that there exists an "inner core of this power" upon which the states may not encroach. *Id.* at 711–12. This "inner core" encompasses any power related to war, and the court reconciles *Zschernig* by placing it within this category as an example of state infringement "as a potential provocation to foreign powers" at the height of the Cold War. *Id.* at 711.

²¹⁰ Chiang, *supra* note 39, at 980.

able effects on foreign relations.²¹¹ Court decisions could establish a litany of impermissible and undesirable effects of state laws, such as angering other nations and directly interfering with the conduct of foreign policy.²¹² The guiding hand of precedent could render the law of foreign relations more predictable, removing from the judicial prerogative the task of ad hoc policy analysis and replacing it with decisions based on straightforward application of precedent to certain categories of state laws.²¹³

D. The *Zschernig* Panic: An Exaggeration

Although some formalist progress in the field of dormant preemption would be wise, *Garamendi* ultimately fails to follow through. Thus, the paranoia of those fearing a federal usurpation of any state power possibly touching on foreign affairs continues. More likely than not, this fear is needless. Even if at some future date courts endorse the broad interpretation of *Zschernig* and the “indirect and incidental effects test,” any impact would probably be minimal. Any state act with effects on foreign affairs so great that they provoke a lawsuit could also probably be invalidated on grounds of statutory preemption.²¹⁴ Chance alone dictates that in an area of such importance, either the legislature or the executive will have spoken on the matter by statute or executive agreement. Illustrating this supposition is the striking fact that not a single pure dormant foreign affairs preemption case has arisen since *Zschernig*.²¹⁵ Furthermore, even in dicta, courts have only rarely interpreted *Zschernig* so as to prohibit any state legislation which happened to touch on foreign affairs—an admitted impossibility in this day and age.²¹⁶ Like Justice Souter and the *Garamendi* majority, most courts have tiptoed around the issue, so as not to offend traditional state prerogatives such as choice of law and enforcement of foreign judgments, which may have a large impact on the international community.²¹⁷

²¹¹ *Id.* at 989.

²¹² *Id.* (noting that such effects of a given state act should be relatively easy to ascertain by looking at communications from foreign states, thereby encouraging input from the political branches).

²¹³ Vázquez, *supra* note 60, at 1319.

²¹⁴ *Id.* at 1259; *see also* *Taiheiyo Cement Corp. v. Superior Court*, 12 Cal. Rptr. 3d 32, 41–42 (Ct. App. 2004) (preempting a state statute on a conflict theory due to conflict with a treaty); *Mitsubishi Materials Corp. v. Superior Court*, 6 Cal. Rptr. 3d 159, 175 (Ct. App. 2003) (avoiding the controversy surrounding either dormant or field preemption by choosing instead to preempt on the terms of a relevant treaty).

²¹⁵ *See* Chiang, *supra* note 39, at 965 (noting that the Supreme Court has taken few post-*Zschernig* cases remotely implicating the question of foreign affairs preemption in general).

²¹⁶ Vázquez, *supra* note 60, at 1317.

²¹⁷ *Id.*

CONCLUSION

An expansive foreign affairs preemption power in the hands of the federal courts is desirable from both a constitutional and policy perspective. Although the Supreme Court's recent *Garamendi* decision does little to remedy or address the functional problems plaguing dormant preemption analysis, the Court's failure to move towards a purely formalist application of preemption doctrine is not a negative development. Rather, the obstacle preemption applied in the *Garamendi* case addressed all the relevant state and federal interests, allowing the court to analyze with accuracy the conflicts between a state statute and an established federal policy. Furthermore, the hesitance and restraint with which courts have traditionally touched the issue of dormant preemption indicates that concern regarding any impending usurpation of state legislative prerogatives is unfounded. Nevertheless, the doctrine should be reformulated and solidified in order to increase predictability and certainty, giving both the federal courts and state legislatures more confidence in actions taken in areas that could possibly affect foreign affairs.